United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7221

IN THE

United States Court of Appeals

For the Second Circuit.

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UNITED STATES COURT OF APPEALS
FILED
DEC 30 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOHN P. LOEBIG,

Appellant,

v.

GEORGE H. LARUCCI,

Appellee.

ON APPEAL FROM THE VERDICT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK AT CIVIL NO. 73-CV-158.

BRIEF FOR APPELLEE.

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THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4181—1977

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In The

United States Court of Appeals

For the Second Circuit.

John P. Loebig,

Appellant,

v.

George H. Larucci,

Appellee.

On Appeal from the Verdict of the United States District Court for the Northern District of New York at Civil No. 73-CV-158.

BRIEF FOR APPELLEE.

Statement of the Issue for Review.

Was the verdict of the jury supported by the evidence and the law?

Statement of the Case.

On April 26, 1971, at approximately 5:55 p.m. in the City of Nuremberg, Germany, the plaintiff, John Loebig of Pittsburgh, Pennsylvania, was a passenger on a Honda motorcycle owned and operated by the defendant, George Larucci, of Schenevus, New York. At the time of this accident, Mr. Larucci was a member of the United States Army stationed in Germany and the plaintiff, John Loebig, was an American civilian having been discharged from the military service in April, 1970.

At the time of the accident, Mr. Larucci was operating his Honda motorcycle in an easterly direction on Bayern Str. Both eastbound lanes were occupied by motor vehicles traveling in the same direction and at the same speed (29a, 46a, 50a). The motorcycle approached the intersection of Moenchener Str. which was controlled by a traffic light which was green for east-westbound traffic (28a). Mr. Larucci's speed was approximately 30 m.p.h. (27a, 49a). As Mr. Larucci approached the intersection, he observed a motor vehicle operated by a Robert Morrison which was stopped (38a, 47a) at the intersection facing in a westerly direction. When the defendant George Larucci was approximately fifteen feet from the motor vehicle of Robert Morrison, the Morrison vehicle pulled directly in front of the motorcycle (48a) making a left turn to proceed southerly on Moenchener Str. and the motorcycle of Mr. Larucci was in collision with the motor vehicle of Morrison. The plaintiff sustained personal injuries.

ARGUMENT.

POINT I.

Trial Court committed no error in its charge.

While it is true that the plaintiff submitted a request to charge as set forth on page 1 of his brief, he specifically withdrew this request and consented to the charge as given (57a, 58a):

> "The Court: I will mark those refused and I will refuse number one of the Plaintiff, and take all of the statute out because to me it just doesn't make sense to give New York State statutory law

by reading the law, or by some interpretation concerning an accident that happened over in Germany."

"Mr. Dattilo: That is fine, Your Honor."

However, the Court substantially charged the essence of the statute (84a) and the plaintiff's request as follows:

"Consider all of the circumstances that were described by Mr. Larucci, and the time of day, and the visibility, and the speed he maintained, and the traffic conditions and the observations that he had of the intersection as he came into it. From that it is for you to decide whether or not the Plaintiff, as shown by the preponderance of the evidence, that Larucci was guilty of negligence, and was involved in some degree of negligence that caused the happening of this accident" (78a, 79a).

"It was the duty of each of those motorists, Morrison in the automobile making a turn, and we know he is coming toward Larucci, and Larucci is driving the motorcycle with the Plaintiff on it, and it was their duty to operate with reasonable care, and having regard to the actual and potential hazards existing from weather, and we had no trouble with the weather here, and road and traffic and other conditions.

"Each of them was under a duty to maintain a reasonable safe rate of speed, and to have his automobile or motorcycle under reasonable control, and keep a proper lookout under the circumstances then existing, and to see if he was aware of what was in his view, and use reasonable care to avoid an accident.

"The relative rights depend upon the distance and speed, and it also goes back to the mutual forebearance, and if we have that quality in the operation of our motor vehicles, it is something that would avoid a lot of these accident.

"I will charge you, of course, that if the Defendant Larucci failed to take precautions necessary to

> avoid a collision with the vehicle that was positioned across his lane, when he had ample time to take such precautions, that the failure of the Defendant to take such precaution was the approximate cause of the Plaintiff's injury, then you must find for the Plaintiff" (84a, 85a).

To which charge there was no exception nor requests (87a).

Furthermore, the jury was particularly cognizant of the situation as it asked during its deliberation to have portions of Mr. Larucci's testimony read to them (89a).

POINT II.

No appeal lies in the absence of a motion for a directed verdict.

It has been held that an appellant cannot argue that a verdict is against the weight of the evidence in the absence of a motion for a directed verdict. No such motion for a directed verdict was made by the appellant, either at the end of the plaintiff's case or at the close of the entire evidence.

This rule has been set forth in the case of *Lowry vs. Black Hills Agency, Inc.*, 509 F. 2d 1311 (1975), 8th Circuit, wherein the Court stated:

> "appellant's contention that the evidence was insufficient to support the verdict requires little discussion. Appellant failed to move for a directed verdict during the trial. In the absence of an appropriate motion for a directed verdict, an Appellate Court is powerless to review the sufficiency of the evidence to support the verdict."

The Second Circuit has also followed this rule in *Contorno vs. Flota Mercante,* 278 F. 2d 719 (1960), 2nd Circuit, which was an action to recover money damages as a result of negligence of Stevedore's employees. The Court stated:

> "* * * we have held on numerous occasions that when a party fails to move for a directed verdict, he may not challenge the sufficiency of the evidence upon appeal."

The Third Circuit reached the same result in *Gebhardt vs. Wilson Freight Forwarding Company,* 348 F. 2d 129 (1965), saying:

> "the failure of the defendant to move for a directed verdict against the plaintiff and cross-claimant at the close of all the evidence foreclosed its right to raise on appeal any issue as to the sufficiency of the evidence and also its right to move for judgment notwithstanding the verdict."

A similar conclusion was reached in the case of *Oliveras vs. American Export,* 431 F. 2d 814 (1970), wherein the Second Circuit in a negligence action again indicated that a plaintiff's motion to set aside a verdict does not remedy the failure of one who has failed to move for a directed verdict, the only exception therein is where evidence of unseaworthiness was undisputed but in the case before the Court there is no claim that the verdict is "totally without legal support."

The Second Circuit in the case of *Rotondo vs. Isthmian Steamship Co., Inc.,* 243 F. 2d 581 (1957), stated the rule as follows:

> "We have again and again held that if a party does not ask for a directed verdict he may not raise the insufficiency of the evidence to sustain it on appeal."

The Court's attention is also directed to the case of *Harriman vs. Midland Steamship Line, Inc.,* 208 F. 2d 564 (1953), Second Circuit, wherein the Court states that:

> "we have repeatedly held that, when a party does not ask for a directed verdict at the close of the evidence, he may not raise it on appeal. Moreover, an Order denying a motion for a new trial because the verdict was 'against the weight of the evidence' is not appealable."

In the *Rotondo* case, *supra,* the Court went on to state that it is

> "hornbook law that the question rests in the discretion of the judge and that when the verdict depends upon the credibility of witnesses the jury is free to accept or reject what they say."

"The plaintiff cannot now attack the verdict as based on insufficient evidence, since he failed to make a motion for a directed verdict." *Nielsen vs. Charles Kurz and Co.,* 295 F. 2d 692 (1961) Second Circuit.

POINT III.

Verdict of the jury should be allowed to stand.

Introduced into evidence without objection was the United States Military police report of April 26, 1971, indicating that Robert Morrison was charged as a result of the accident with failure to yield the right-of-way (101a).

Here, as in the case of *Bolan vs. Lehigh Valley Railroad Co.,* 167 F. 2d 934 (1948), Second Circuit, the appellant seeks to have the jury verdict set aside on the grounds that other inferences might have been drawn

from the evidence. In the *Bolan* case the Court quoted the United States Supreme Court in the case of *Lavender vs. Kurn.* 327 U. S. 645, 653; 66 S. Ct. 740, 744, 90 L. Ed. 916 (1945):

> "It is no answer to say that the jury's verdict involved speculation and conjecture * * *. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Here, as in the *Bolan* case, "the record contains testimony from which the jury could reasonably have drawn * * *" that the defendant was without negligence and therefore the Court has "no power to upset a verdict based on that evidence."

Equally unconvincing is the appellant's claim that there was insufficient evidence to support the jury's verdict in favor of the defendant.

> "Only where there is no 'evidence of substance' upon which reasonable men could reach the result represented by the verdict is the trial judge empowered to set aside the verdict and enter judgment n.o.v. for the moving party * * *. It is hornbook law that when a motion is made to set aside the verdict, the trial court, as well as the appellate courts, must view the evidence in the light most favorable to the non-moving party, and must give that party the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."

Lebrecht vs. Bethlehem Steel Corporation, 402 F. 2d 585 (1968), Second Circuit. The *Lebrecht* case also sets forth that the "basic function of the jury 'is to select from among conflicting inferences and conclusions that which it considers most reasonable.'"

The position has been set forth in the case of *Berner vs. British Commonwealth Pacific Airlines Ltd.,* 346 F. 2d 532 (1965), Second Circuit, wherein the Court succinctly stated that "the separate role to be played by the jury with respect to the facts and by the court with respect to the law have been rather firmly settled for many generations." Citing the Supreme Court in *Tennant vs. Peoria and Pekin Union Railway,* 321 U. S. 29, 1944:

> "It is the jury, not the court, which is the fact-finding body. It weighs the contrary evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. The conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In the *Berner* case, the Court went on to state that this admonition was re-emphasized in the *Lavender vs. Kurn,* 327 U. S. 645, case in which it is set forth that:

> "it is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the

> dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Also, in the case of *Gebhardt vs. Wilson Freight and Forwarding Company,* 348 F. 2d 129 (1965), Third Circuit, the appellant argued as here that the evidence upon which it relied in the trial of the action prepondered in its favor and the court held that the argument cannot avail the appellant on the appeal because it is the "function of the jury as the fact-finding body, to weigh the evidence and inferences." There as here, "if the evidence in the record, viewed from the standpoint of the successful party, is sufficient to support the jury verdict, a new trial is not warranted merely because the jury could have reached a different result." Neither the trial court nor the appellate court may substitute its judgment for that of the jury on disputed issues of fact.

POINT IV.

Question of defendant's negligence was a jury question.

It is stressed in the appellant's brief in both his argument and conclusion that the defendant was exceeding the speed limit.

This is not correct.

The police report of the accident (101a) was introduced into evidence (43a) without objection. While being questioned by the appellant's attorney, the defendant was asked what the report stated was the speed limit (49a, 50a). The defendant was unable to and the attorney for the plaintiff agreed that whether the speed limit was 31 m.p.h. or 37 m.p.h. was "for the determination of the jury" (50a).

By the jury's verdict, the jury either determined that the speed limit was 37 m.p.h. and thus the defendant was not exceeding the speed limit or if the speed limit was 31 m.p.h., such was not negligence under the facts of the case.

In any event, it was a question of fact for the jury.

Furthermore, the police report states Morrison, the operator of the adverse motor vehicle, stated to the police that he stopped at the intersection intending to make a left turn and that he "glanced to the right and not seeing any traffic" (100a) he proceeded to make his turn. By not seeing what he was "bound to see" (*Weigand vs. United Traction Co.* [1917], 221 N. Y. 39), what by the "proper use of her senses she might have seen," Morrison was charged with failure to yield right-of-way (101a).

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted,

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